No. 16,091

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES W. GRIMM,
Appellant,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

OPENING BRIEF FOR CHARLES W. GRIMM, APPELLANT.

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OPENING BRIEF FOR CHARLES W. GRIMM, APPELLANT.

Comes now Charles W. Grimm, Appellant, and respectfully submits his Opening Brief on appeal wherein he appeals solely and exclusively from those portions of that certain "memorandum and order on motions for a new trial" made by the United States District Court, Southern District of California, Northern Division, wherein and whereby said Court ordered that the verdict of the jury, insofar as it found the Appellee liable for the damages suffered by Appellant, be vacated and set aside, and wherein and

whereby said Court ordered a new trial on the issue of causation.

PLEADINGS AND FACTS DISCLOSING JURISDICTION.

A. Jurisdiction of District Court.

This is a civil action originally filed by Charles W. Grimm as plaintiff in the Superior Court of the State of California, in and for the County of Kern, under Clerk's File No. 70422, alleging breach of both an express and an implied warranty of fitness for use of certain agricultural chemicals purchased directly from, and used in accord with, the directions of Appellee, defendant there, and subsequent damage in excess of $3,000.00 to a peach orchard owned by Appellant and situated in the County of Kern, State of California, with the contract of purchase and sale and of warranty having been made and performed in said Kern County (R. 6-12).

Appellee, upon service of Complaint and Summons, forthwith petitioned the United States District Court, Southern District of California, Northern Division, for its order removing the action from the said State Court to the said United States Court on the basis of diversity of citizenship. The petition for the removal alleged generally the filing of the action in the State Court, that sole plaintiff, Charles W. Grimm, was a resident and citizen of the State of California, that sole defendant, California Spray-Chemical Corporation, was a corporation, organized and existing under the laws of the State of Delaware and was a resident and citizen of the State of Delaware, and that the

amount in controversy exceeded the sum of $3,000.00 (R. 3-5). A good and sufficient bond on removal, securing costs, was filed with said petition.

The facts alleged in the petition for removal being true, Appellant did not oppose the petition.

The jurisdiction of the United States District Court rests on 28 U.S.C.A. 1332 (Diversity of Citizenship and Amount in Controversy). Venue in the Southern District of California, Northern Division, rests upon 28 U.S.C.A. 1391 (a) and (c) (Venue generally). The right of removal from the State Court to the Federal Court rests upon 28 U.S.C.A. 1441 (a) (Actions Removable Generally).

B. Jurisdiction of the Court of Appeals.

1. Jurisdiction under Section 1291 of Title 28, U.S.C.A., on the basis that the Order is a denial of a Motion for New Trial.

The jurisdiction of the United States Court of Appeals, for the Ninth Circuit, to hear and determine this "Appeal" is difficult and close, and indeed may be the most important issue to be here determined. Therefore, a rather complete review of events, documents filed and proceedings had through the order appealed from is deemed essential here.

The cause was heard by a jury and verdict and judgment thereon entered in favor of Appellant (R. 16-17). Judgment was entered on April 25, 1958 (R. 18). Believing himself aggrieved by the inadequacy of the amount of damages awarded, on May 3, 1958, Appellant filed a motion for a new trial limited solely to the issue of the extent and nature of dam-

ages, with supporting points and authorities (R. 18-37). On May 5, 1958, Appellee filed a Motion for a New Trial on all issues, with supporting affidavit. The grounds urged in Appellant's motion were (1) inadequate damages awarded and (2) insufficiency of the evidence to justify that portion of the verdict fixing damages (R. 19). The grounds urged in Appellee's motion were (1) error in excluding evidence, (2) improper verdict arrived at by compromise resulting from coercion, (3) newly discovered evidence (R. 37-39).

On May 19, 1958, some twenty-four days after entry of the judgment, oral arguments on the motions of appellant and of appellee for a new trial were heard. Points and authorities in support of appellant's motion for a new trial on limited issues were before the Court (R. 20-37). Points and Authorities in opposition thereto were before the Court (R. 43-47). The Affidavit of James S. Peden, Foreman of the Jury that heard the cause, filed by Appellant, was before the Court (R. 48-49). The Affidavit of Alwyn C. Sessions in support of Appellee's motion for a new trial on all issues was before the Court (R. 38-42). The Affidavits of W. W. Wright (R. 50-51), of W. H. Hart (R. 52), of Roy Mitchell (R. 53-54), and of Joe Guimarra (R. 54-56), filed by Appellant in opposition to the Affidavit of Alwyn C. Sessions were before the Court.

On May 22, 1958, some twenty-seven days after the date of entry of judgment, the Court issued and filed its "Memorandum and Order on Motions for a New Trial and Order Fixing Date for Resetting for Trial" (R. 57-61).

In its said Memorandum and Order, the Court reviews the facts of the verdict and judgment, the filing of the motions for a new trial, states the issues submitted to the jury, to-wit, causation and extent and nature of damages, recites that the jury deliberated some fourteen hours and once, late in its deliberations, announced that it was unable to reach a verdict, declares that the damages awarded were unquestionably inadequate, gives the opinion that the issue of causation was a difficult and close one, concludes that a new trial should be granted only on the two issues submitted to the jury and orders:

(1) That the verdict of the jury be vacated and set aside in its entirety.

(2) That a new trial be granted on the two issues submitted to the jury (causation or liability and nature and extent of damages).

(3) Denies defendant's, Appellee here, Motion for a New Trial.

This appeal is taken from portions of the Orders numbered (1) and (2) above, to-wit, vacating the jury's finding on liability and ordering a new trial on liability.

Cases holding that an order granting a motion for a new trial is not an appealable order are legion. Some cases so holding are *Hayes v. United States,* 172 Fed. 2d 677, 679-680 (9th Cir. 1949); *Libby, McNeill & Libby v. Malmskold,* 115 Fed. 2d 786, 787 (9th Cir. 1941); *Frank Mercantile Corp. v. Prudential Insurance Co.,* 115 Fed. 2d 496, 497 (3rd Cir. 1940); *Tsoleas*

v. Hege, 250 Fed. 2d 127 (4th Cir. 1957); *Ford Motor Co. v. Busam Motor Sales,* 185 Fed. 2d 531, 533, 536 (6th Cir. 1950).

Section 1291 of Title 28, U.S.C.A., insofar as it is material here, states that "the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

Under this statute, an order granting a new trial is held to be a non-appealable order for the reason that it is not a *final* decision, but is interlocutory. However, an order denying a motion for a new trial is held to be a final decision and is thus an appealable order, if there has been an abuse of discretion. Appeals from orders denying a motion for a new trial are regularly heard as part of an appeal from the original judgment. *Flintkote Company v. Lysfjord,* 246 Fed. 2d 368, 389 (9th Cir. 1957), Cert. Denied, 355 U.S. 835; *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.,* 239 Fed. 2d 815, 816 (3rd Cir. 1956); *Uhl v. Echols Transfer Co.,* 238 Fed. 2d 760, 761 (5th Cir. 1956); *Whitman v. Pitrie,* 220 Fed. 2d 914, 918 (5th Cir. 1955); *Peterman v. Indian Motorcycle Co.,* 216 Fed. 2d 289, 291 (1st Cir. 1954).

The order as made is in substance and in fact a denial of appellant's motion for a new trial, limited to the issue of the extent and nature of his damages. Appellant moved the trial court for its order vacating and setting aside that portion of the jury's verdict and the judgment based thereon fixing and awarding him damages in the amount of $4,750.00 on the basis that the amount awarded was inadequate, and not supported by the evidence (R. 19).

The Appellee agrees that the sum awarded as damages was inadequate. In its Memorandum in Opposition to Plaintiff's Motion for New Trial, it states "but defendant does agree with the plaintiff that if the question of liability was to be eliminated, the damages sustained by plaintiff far exceed the sum awarded" (R. 44). The court agrees with appellant that the sum awarded as damages was inadequate. In its Memorandum and Order on Motion for a New Trial, the Court states:

> "I have reviewed the record in this case, and I am satisfied that the undisputed evidence established that the plaintiff suffered minimum damages in the sum of $9,919.00, which figure resolves all doubt as to the extent of damages against the plaintiff. Therefore, I am satisfied that the verdict of $4,750.00 was inadequate under the evidence in this case . . ." (R. 59).

The trial court specifically denies appellee's motion for a new trial. The Court does not specifically grant or deny appellant's motion for a new trial, but, proceeding on its own initiative, on grounds not urged or mentioned in either motion, vacates the verdict in its entirety and orders a new trial on the two issues of proximate cause and damages (R. 57-61). Appellant contends that this is in substance and in fact a denial of his motion for a new trial and further contends that the court abused its discretion by forcing upon him a new trial, which he did not request and which is beyond the scope of his motion. This contention of abuse of discretion will be developed in detail later in this brief.

If appellant is on sound ground in contending that the trial court's order amounts to a denial of his motion for a new trial, then Section 1291 of Title 28 U.S.C.A. constitutes statutory authority under which this Court of Appeals has jurisdiction to hear and determine this appeal. In *Flintkote Company v. Lysfjord,* 246 Fed. 2d 368, 389 (9th Cir. 1957), in connection with an appeal from an order denying a motion for a new trial made upon the grounds that the verdict on damages was excessive, this Court of Appeals stated:

> "At the outset appellees question this court's power to review the denial of a new trial on the grounds of excessive damages. Regardless of what the rule may be in other circuits, this court has repeatedly affirmed its authority to review such a denial. (Citing cases.) And it may reverse the lower court's decision if it finds the verdict grossly excessive or monstrous. *So. Pac. Co. v. Guthrie,* 9 Cir., 186 F. 2d 295. Stated differently, however, appellant's contentions in the instant case actually challenge the sufficiency of the evidence to support the jury verdict, a question of law, and one which this court or any appellate court of ordinary jurisdiction has undoubted power to decide."

It is recognized that in the ordinary situation, which was true in the *Flintkote Co.* case, when a motion for a new trial is denied, the verdict or judgment is affirmed and the appeal from the denial of the motion is heard as a part of an appeal from that judgment on the basis of insufficiency of the evidence. In the case at bar, both parties moved for a new trial.

Appellee's motion was specifically denied. Appellant is in the anomalous position of arguing that his motion for a new trial was denied but having no judgment or verdict from which to appeal for the reason that the Court, in excess of its jurisdiction, issued an Order vacating the verdict in its entirety. However, this is not believed to bar this appeal under the rule of *Phillips v. Negley,* 117 U.S. 665, 6 S. Ct. 901, 29 L. Ed. 1013 (1886); *Untersinger v. United States,* 181 Fed. 2d 953 (2nd Cir. 1950); and *Jackson v. Wilson Trucking Corp.,* 243 Fed. 2d 212 (D.C. Cir. 1957), to the effect that an order made without jurisdiction on the part of the Court making it is a proceeding which must be the subject of review by an Appellate Court.

2. Jurisdiction under Section 1292 of Title 28, U.S.C.A.

On September 2, 1958, Section 1292 of Title 28, U.S.C.A., was amended (Public Law 85-919; 72 Stat. 1770). The amendment adds a new subparagraph to this section, reading as follows:

> "(b) When a District Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, that application

for an appeal shall not stay proceedings in the District Court unless the District Judge or the Court of Appeals or a Judge thereof shall so order." Approved September 2, 1958.

A statute is presumed to speak from the time of its enactment and embraces all such persons or things as subsequently fall within its scope. *M/V Monsuco, Inc. v. Comm. Int. Rev.,* 234 Fed. 2d 583, 588 (4th Cir. 1956); *Strategical Demolition Torpedo Co. v. United States,* 110 Fed. Supp. 264, 265, 124 Ct. Cl. 492 (1953).

Changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future, unless a contrary intent is expressed in the statute. *Dargel v. Henderson,* 200 Fed. 2d 564, 566 (Emergency Ct. of App. 1952).

The line between substantive and procedural law is sometimes hazy, but in keeping with the spirit of Federal Civil Procedure, any uncertainty should be resolved in favor of applying new law to pending litigation. The aim of Congress in revising the judicial code, being procedural, the new provisions are applicable to pending proceedings unless the contrary appears in the statute. *Hadlich v. American Mail Line,* 82 Fed. Supp. 562, 563-564 (N.D. Cal. 1949).

A suit in the process of appeal is a "pending suit" within the rule that an amendment relating only to procedural machinery provided to enforce substantive rights applies to pending as well as future suits. *Bowles v. Strickland,* 151 Fed. 2d 419 (5th Cir. 1945).

The above-quoted amendment to Sec. 1292 of Title 28, U.S.C.A., did not replace or modify any existing statute or portion of a statute. Therefore, being wholly new, it may well be that the order herein appealed from is not drawn in a manner that will bring this appeal within the shelter of the new statute.

This is a civil action, and the order is not otherwise appealable under said Section 1292. Was the District Judge of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion? In its memorandum and order, the Court states:

> "In order to accomplish this duty (see that both parties receive a fair trial), I feel that a new trial must be granted on two issues which were submitted to the jury. *I feel that I have power to do so,* even though the plaintiff has restricted his motion for a new trial only on the issue of damages." (Emphasis ours.)

There is doubt in the mind of the Court. This doubt arises from the following rules:

1. A motion for a new trial is addressed to the sound discretion of the Court. *Complete Auto Transit v. Floyd,* 249 Fed. 2d 396, 399 (5th Cir. 1957).

2. Rule 59 (d) of Federal Rules of Civil Procedure, Title 28, U.S.C.A., provides that, not later than ten days after entry of judgment, the Court on its own initiative may order a new trial on any meritorious grounds.

3. The rule that after ten days subsequent to the entry of judgment the court is limited in the order it

can make to the scope of the motions timely filed and then before it. *Patton v. Baltimore & Ohio R. Co.,* 120 Fed. Supp. 659, 214 Fed. 2d 129 (3rd Cir. 1954); *Kanaster v. Chrysler Corp.,* 199 Fed. 2d 610, 615 (10th Cir. 1952).

Is this indication of uncertainty sufficient to show that it was the judge's opinion that there was substantial grounds for a difference of opinion on his power to make the order for a new trial, include issues not within the scope of the motion before him, more than ten days after the entry of judgment? Appellant contends that it is.

The final provision of Section 1292 (b) which appellant must fulfill or avoid is to the effect that the district judge shall state in writing in his order that an immediate appeal from the order may materially advance the ultimate termination of the litigation. There being no such statutory provision when the memorandum and order were drafted, there is of course no such statement in the order. Is appellant's appeal to be barred by this technicality?

If, as appellant contends, the court was acting in excess of its jurisdiction by ordering a new trial on both the issue of proximate cause and the issue of nature and extent of damages, at a time more than ten days after the entry of judgment, and when it had no such motion before it, or acted in abuse of its discretion by forcing upon appellant a new trial that appellant did not desire and did not request, more than ten days after entry of judgment, then the order

ought to be and, either now or later, will be reversed. If upon reconsideration, either here or at some later date, the District Court is reversed with directions, and it is then determined that the interests of justice require that appellant's motion be denied, the litigation is at an end. If upon reconsideration the interests of justice require that the motion be granted, then the time of trial will be reduced by three to four days and costs to the litigants and to the government will be reduced by at least two-thirds.

Should a new trial as ordered be had and a verdict in favor of appellant be entered and damages be awarded commensurate with his losses, then, most surely, appellee here will appeal on the basis that the order of a new trial was in excess of the court's jurisdiction. If upon a further trial a verdict against appellant is entered, then he, most surely, will appeal on the basis that the court's order for a new trial was in excess of its jurisdiction and an abuse of discretion. In other words, this Court of Appeals must eventually determine the issues here presented. To dismiss this appeal on the basis of a technical flaw in the order, which would have been corrected had the court or counsel the prescience to foretell the contents of this new subparagraph (b) now added to said Section 1292, will do nothing but promote expensive, time-consuming but useless litigation.

Rule 1 of Title 28, U.S.C.A., provides in part that "They (these rules) shall be construed to secure the just, speedy, and inexpensive determination of every action."

The purpose of these rules was to eliminate complaints as to technicalities of the law, the subtleties of practice and the involvements of procedure. *United Press Ass'ns v. Charles,* 245 Fed. 2d 21, 26 (9th Cir. 1957).

In *Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co.,* 178 Fed. 2d 866, 870 (2nd Cir. 1950), considering an appeal from an interlocutory order made pursuant to a motion for a change of venue, the court finds that, notwithstanding the absence of technical jurisdiction, the merits of the appellant's position might be so plain that we ought not to hesitate to intervene, even though the order for transfer could be reviewed on appeal from the judgment eventually entered. (This paraphrase of the *Magnetic Etc.* rule appears in *Foster-Milburn Co. v. Knight,* 181 Fed. 2d 949, 951 (2nd Cir. 1950).)

In *Milton v. United States,* 120 Fed. 2d 794, 796 (5th Cir. 1941), in considering an appeal from the denial of a motion for a new trial the court states:

> "That appellant has mistakenly appealed from the order overruling the motion for a new trial . . . may be considered purely a technicality. In the interests of justice and to avoid prolonging litigation for no good purpose, without intending to create a precedent, we consider that we may disregard the motion to dismiss the appeal and decide the case on its merits.
>
> "The rules of civil procedure were adopted to abolish technicalities and to expedite the due administration of justice."

In *Creedon v. Loring,* 249 Fed. 2d 714, 716-717 (1st Cir. 1957), the court states generally as follows: Where the District Court denied a timely motion for a new trial and appellant's appeal was timely filed but was from the order denying his motion for a new trial and not from the judgment, appellee's motion to dismiss the appeal on the ground of lack of jurisdiction because the appeal was not taken from the final judgment would be denied because appellee's motion was founded not on merit but a pure technicality.

The legislation which resulted in the amendment to said section 1292 was introduced at the request of the Administrative office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. In the legislative history three examples of situations which the amendment is designed to prevent are given. These examples show a motion, an interlocutory order, subsequent trial, entry of judgment, appeal from the interlocutory order in connection with an appeal from the final judgment and a reversal of the interlocutory order, which caused the trial to have been a useless gesture accomplishing nothing, and wasting the time of the District Court, witnesses and litigants, and considerable expenses on the part of the litigants. The situations given in the examples are squarely in point with the circumstances presented here. See, *U.S. Code Congressional and Administrative News,* 1958, pp. 7263-7266, West Publishing Co., advance pamphlet, No. 18, dated October 20, 1958.

Except for objections based on technical grounds, to wit, the absence of a more explicit declaration by the District Court that its order for a new trial involves a controlling question of law on which there is substantial grounds for a difference of opinion and any declaration that an immediate appeal from the order would materially advance the ultimate termination of the litigation, it is believed that this Court of Appeals has jurisdiction to hear and determine this appeal under Section 1292, as amended, of Title 28, U.S.C.A.

3. Jurisdiction under Certiorari.

Appellant contends that the trial court acted in excess of its jurisdiction in vacating the judgment in its entirety and granting a new trial on the issue of causation as well as the issue of damages.

There are numerous cases holding that questions concerning the jurisdiction of the District Court to make a certain order are reviewable under the appellate court's general powers to issue extraordinary writs. Section 1651 of Title 28, U.S.C.A.

In *Greyerbiehl v. Hughes Electric Co.,* 294 Fed. 802, 804 (8th Cir. 1923), the court states, the question of the jurisdiction of the District Court to make an order vacating a verdict and judgment and granting a new trial is reviewable by the Circuit Court of Appeals on a writ of error, or, if through no fault of the appellant, an application for a writ of error was not filed within the required time the question of jurisdiction is reviewable by the Court of Appeals on a writ of certiorari.

In *Magnetic Eng. & Mfg. Co. v. Dings Mfg. Co.,* 178 Fed. 2d 866, 869 (2nd Cir. 1950), the Court holds that, inasmuch as the appellant had no other speedy and adequate remedy, and the Court had jurisdiction to issue the writ, if appellant had applied for it, where appellant attempted to appeal from a non-appealable order, the court of appeals was free to treat the appeal as a petition for mandamus.

In *In re Chetwood,* 165 U.S. 443, 17 S. Ct. 385, 41 L. Ed. 782 (1897), the United States Supreme Court stated:

> "Whenever the circumstances imperatively demand that form of interposition, the writ (certiorari) may be allowed, as at common law to correct excesses of jurisdiction and in the furtherance of justice."

If the lower court is clearly without jurisdiction the writ of certiorari will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. *Hazeltine Corp. v. Kirkpatrick,* 165 Fed. 2d 683, 685 (3rd Cir. 1948).

Where the District Court has attempted to set aside or annul a judgment or decree and in doing so has acted wholly without jurisdiction or power in the premises, its act is void and mandamus will lie to correct the error. *In re Dernett,* 215 Fed. 673, 679 (9th Cir. 1914), citing *Phillips v. Negley,* 117 U.S. 665, 671-672, 6 S. Ct. 901, 903, 29 L. Ed. 1013 (1886), as holding that, if an order is made without jurisdiction on the part of the court making it, then it is a

proceeding which must be the subject of review by an appellate court.

An appeal lies from an interlocutory order of a judge, vacating a judgment and directing a new trial, if when he acts the time has passed within which he has the power to change the judgment. *Untersinger v. United States,* 181 Fed. 2d 953, 955 (2nd Cir. 1950), citing *Foster-Milburn Co. v. Knight,* 181 Fed. 2d 949, 951 (2nd Cir. 1950), as holding that, if a court reopens a judgment after the time has passed within which it has the power to do so, an appeal lies, although the order grants a new trial and is therefore interlocutory. Accord, *Jackson v. Wilson Trucking Corp.,* 243 Fed. 2d 212, 214 (D.C. Cir. 1957), which held that:

> "An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the court, it may be reviewed notwithstanding the absence of a final judgment."

That appellant may have mistakenly appealed from the interlocutory order and mistakenly denominated his papers as an appeal, when more properly he should have petitioned for a writ of certiorari, and so indicated in his notices and pleadings, need not be fatal to the relief requested.

In *Ivanhoe Irrigation District v. McCracken,* 78 S. Ct. 1174, 1183 (June 23, 1958), the United States Supreme Court, admitting that it had no jurisdiction over the appeals, determined to treat the papers as petitions for certiorari and granted certiorari.

In *Creedon v. Loring,* 249 Fed. 2d 714, 716-717 (1st Cir. 1957), plaintiff appealed from an order denying his motion for a new trial. Defendant moved to dismiss the appeal for lack of jurisdiction, contending that the order appealed from was not an appealable order and that the appeal should have been taken from the judgment. Held: The motion to dismiss would be denied because it was founded on a pure technicality.

In *Amsler Morton Corp. v. Union of Soviet Socialist Republics,* 226 Fed. 2d 289 (4th Cir. 1955), the Court of Appeals recognizes that a petition for certiorari is an appropriate procedure for the review of a District Court's interlocutory order.

In *Milton v. United States,* 120 Fed. 2d 794, 796 (5th Cir. 1941), an appeal from an order denying a motion for a new trial, the Appellate Court states:

> "That appellant has mistakenly appealed from the order overruling the motion for a new trial . . . may be considered purely a technicality. In the interests of justice and to avoid prolonging litigation for no good purpose, without intending to create a precedent, we consider that we may disregard the motion to dismiss the appeal and decide the case on its merits."

Untersinger v. United States, 181 Fed. 2d 953 (2nd Cir. 1950); *Foster-Milburn Co. v. Knight,* 181 Fed. 2d 949 (2nd Cir. 1950); *Turner v. United States,* 229 Fed. 2d 944 (6th Cir. 1956); *Fried v. McGrath,* 133 Fed. 2d 350 (D.C. Cir. 1942); *Jackson v. Wilson Trucking Corp.,* 243 Fed. 2d 212 (D.C. Cir. 1957);

Phillips v. Negley, 117 U.S. 665, 6 S. Ct. 901, 29 L. Ed. 1013 (1886); *Lebeck v. William A. Jarvis, Inc.,* 250 Fed. 2d 285 (3rd Cir. 1957) all involved appeals from an order granting a motion to vacate a verdict or judgment and for a new trial, as distinguished from the review of such an order by writ of error or certiorari. All cases held such an order to be reviewable on an appeal based on the ground of conduct by the District Court in excess of its jurisdiction. All resulted in a determination of the appeal on its merits.

Kanaster v. Chrysler Corporation, 199 Fed. 2d 610 (10th Cir. 1952); *In re Dernett,* 215 Fed. 673 (9th Cir. 1914); *Greyerbiehl v. Hughes Electric Co.,* 294 Fed. 802 (8th Cir. 1923); *In re Chetwood,* 165 U.S. 443, 17 S. Ct. 385, 41 L. Ed. 782 (1897); *Amsler Morton Corp. v. Union of Soviet Socialist Republics,* 226 Fed. 2d 289 (4th Cir. 1955); *Hazeltine Corp. v. Kirkpatrick,* 165 Fed. 2d 683 (3rd Cir. 1948), and *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.,* 178 Fed. 2d 866 (2nd Cir. 1949) all make it abundantly clear that the granting of a motion to vacate a verdict or judgment and for a new trial or other manifestly interlocutory order of the District Court is subject to review under one of the extraordinary writs, to-wit, mandamus, error or certiorari, if sound grounds are shown to the effect that the trial court acted in excess of its jurisdiction in making the order. Such writs are available under Section 1651 of Title 28, U.S.C.A. Under certain circumstances an appeal improvidently taken may be regarded and acted upon as a petition for writ of certiorari. Section 2103 of Title 28, U.S.C.A.

4. Jurisdiction under Section 1291 of Title 28, U.S.C.A., on the basis that the order is a final decision on new matter arising after judgment.

John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 239 Fed. 2d 815 (3rd Cir. 1956), involved an appeal from an order denying a motion for a new trial, but no appeal from the judgment, which the order left undisturbed. Appellee moved to dismiss the appeal on the basis that this was not an appealable order. The Appellate Court, at page 816, held:

> "However, to the extent that the denial of the motion for a new trial involves new matters arising after entry of the judgment and which were accordingly not decided by the judgment, it may present appealable subject matter for consideration upon an appeal from the order denying the motion, as distinguished from an appeal from the original judgment."

The Court cites *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474, 482, 485, 53 S. Ct. 252, 255, 77 L. Ed. 439 (1933), as holding that under certain circumstances the Appellate Court may inquire into the action of the trial court on a motion for a new trial. Examples given are where the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion; acted in the mistaken view that it had no jurisdiction to grant the motion; or that there was no authority to grant it on the grounds advanced.

All of the matters involved in this appeal are matters which occurred after the entry of the judgment, save and except the assessing of damages at $4,750.00,

which all parties, including the Court, agree were grossly inadequate. These matters were not decided by the judgment, and will not be decided by any subsequent judgment. No good reason comes to mind why the rules, set forth in the two cases cited immediately above, should not be as applicable to orders granting a new trial as to orders denying a new trial, except, perhaps, that the former is a little further removed from a literal and technical application of the "final decision" phrase of 28 U.S.C.A., Section 1291.

This appeal involves an issue of law, to-wit, the jurisdiction of the trial court to make the order under *Rule 59 of Title 28, U.S.C.A.,* together with the contention that the Court abused its discretion in forcing upon the moving party a new trial of a scope which he neither requested nor desired. No issues of fact or discretion are involved.

Under any view of these proceedings, the order constitutes the final decision of the District Court on the issues here presented. It is true that Appellant can submit to the order, proceed with and bring a new trial to a conclusion, and then as part of an appeal from the judgment then entered bring these issues before this Court. It is this circuitous, time-wasting and expensive route which the amendment to Section 1292, of Title 28 U.S.C.A., was designed to avoid.

To sum up the factual situation and the matter of jurisdiction of the United States Court of Appeals for the Ninth Circuit, it is the contention of Appellant that this Court has jurisdiction under one or all of the following statutes and premises:

The jury brought a verdict in favor of plaintiff-Appellant and judgment based on the verdict was entered. Defendant-Appellee moved to vacate the judgment in its entirety and for a new trial on all issues on the basis of error in exclusion of evidence, compromise verdict resulting from coercion, and newly discovered evidence. Appellant moved to vacate that portion of the judgment fixing and allowing damages and for a new trial on the single issue of damages on the basis that the damages awarded were grossly inadequate and not supported by the evidence. Some twenty-seven days after entry of the judgment, the District Court made and entered its order denying defendant-Appellee's motion and then, with only plaintiff-Appellant's motion before it, ordered the judgment vacated in its entirety and a new trial on the issues of causation and damages.

1. Appellant contends that this was in substance and in fact a denial of his motion and an act of the Court, taken on its own initiative in excess of its jurisdiction and imbued with an abuse of discretion. If this contention is sound, we do have an order reviewable on appeal under the time honored rule of *Phillips v. Negley,* 117 U.S. 665, that an order made without jurisdiction on the part of the Court making it is a proceeding which must be the subject of review by an Appellate Court. *Jackson v. Wilson Trucking Corp.,* 243 Fed. 2d 212 (D.C. Cir. 1957); *Fried v. McGrath,* 133 Fed. 2d 350 (D.C. Cir. 1942); *Kanaster v. Chrysler Corporation,* 199 Fed. 2d 610 (10th Cir. 1952); *In re Dernett,* 215 Fed. 673 (9th Cir. 1914).

2. Appellant contends that Section 1292 of Title 28, U.S.C.A., as amended by the addition of subdivision (b), specifically provides that the order here under review is an appealable order. However, inasmuch as the amendment was not in existence when the order was drafted, certain technical language, which the amendment requires, was omitted. Under the liberal interpretation of the Federal Rules of Civil Procedure, always applied by the Federal Courts, appellant's appeal from the order may be deemed properly before this Appellate Court under said Section 1292 as amended. The line of reasoning here is to the effect that changes in procedure apply to causes already accrued and pending as well as those thereafter accruing; a cause on appeal is an action pending; changes in Federal rules of procedure are procedural changes; objections to bringing this order within the scope of the amendment are purely technical and do not go to the merits.

3. Appellant's notices, petitions and briefs, even denominated an appeal, may, under liberal construction, be regarded as an application for a writ of certiorari if certiorari is the proper legal proceeding for bringing these matters on for review by this Court.

4. The order as entered constitutes a final decision on questions of law, not involved in the judgment and which will not be determined in any subsequent judgment which may be entered herein. Therefore, the order is an appealable order under Section 1291 of Title 28, U.S.C.A., granting the Courts of Appeals jurisdiction over appeals from all "final decisions"

of the district courts except those subject to direct review by the Supreme Court.

STATEMENT OF THE CASE.

Appellant's action was originally filed in the Superior Court of the State of California, in and for the County of Kern. The Complaint alleged plaintiff to be the owner of a certain peach orchard located in Kern County; that plaintiff purchased certain agricultural chemicals from Appellee to be used as a mixture in a spray to be applied to his peach orchard; that he mixed, used and applied the chemicals at the time and in the manner and amount recommended by Appellee; that Appellee both expressly and by implication under California's version of the Uniform Sales Act warranted that if the chemicals were so mixed, used and applied, they were fit for their intended use and would not injure the peach trees; that the spray did injure his orchard (R. 6-10) and that his damages therefrom totaled $22,537.86 (R. 58-59).

Appellee moved the United States District Court, Southern District of California, Northern Division, for its order transferring the cause to that Court on the basis of diversity of citizenship and matter in controversy within its monetary jurisdiction (R. 3-5). The motion was unopposed and was granted.

Appellee's Answer admitted the sale and the use of the chemicals as a spray on the peach orchard, but denied the warranty both express and implied, denied

that the chemicals were mixed, used and applied at the time and in the manner and amounts it had recommended, denied that the spray caused the damage to the orchard and denied that Appellant suffered any loss (R. 12-16).

Just prior to the opening of trial, defendant-Appellee stipulated to the making of the warranty and that the chemicals were mixed, used and applied according to its recommendations as to time, amount and manner. These issues were never submitted to the jury. Only two issues were submitted to the jury. These were: (1) Did the spray in fact cause any damage or injury to plaintiff's peach orchard? (2) If the spray did cause any damage to plaintiff's peach orchard, then what was the nature and extent of the damage so caused? (R. 58-59).

After trial lasting some six days, the jury returned a unanimous verdict in favor of Appellant on both issues, finding that the spray did damage the peach orchard but fixing the amount of the damage at $4,750.00 (R. 16-17). Judgment based on the jury's verdict was entered on April 25, 1958, and notice thereof duly given (R. 17-18).

Appellant, deeming himself aggrieved by reason of the inadequacy of the amount of damages awarded, filed his notice of intention to move for a new trial limited to the issue of the nature and extent of damages, with points and authorities in support of his motion attached, on May 3, 1958 (R. 18-37). On May 5, 1958, defendant-Appellee filed its motion for a new trial on all issues, and an Affidavit in support of its

contention that it had discovered new evidence (R. 37-42). On May 9, 1958, Appellee filed its memorandum in opposition to Appellant's motion for a new trial on the issue of damages alone (R. 43-47).

It should be noticed that May 5th was the 10th day after the entry of judgment and the last day on which a motion for a new trial could have been filed, under Rule 59 (b) of Title 28, U.S.C.A., *Federal Rules of Civil Procedure,* and the last day on which the Court on its own initiative could have ordered a new trial, under Rule 59 (d) of *Federal Rules of Civil Procedure.*

On May 19, 1958, after receipt of additional affidavits, one in support of Appellant's motion, the affidavit of James S. Peden, Jury Foreman (R. 48-49), and four in opposition to Appellee's contention of newly discovered evidence (R. 49-56), the Court heard oral argument on their respective motions by counsel for both parties (R. 58). On May 22, 1958, the Court issued and entered its memorandum and order on motion for a new trial (R. 57-61).

In its memorandum, the Court, after reviewing the verdict, the substance of the motions for a new trial, the issues submitted and the deliberations of the jury, declares that the undisputed evidence established damages of $9,919.00, concludes that the verdict for $4,750.00 was inadequate, declares that in its opinion the issue of causation was a difficult and close one for the jury and concludes that the jury did not give proper consideration to the evidence on either the issue of liability or the issue of damages (R. 57-60).

Appellee acknowledges that the damages actually suffered by Appellant "far exceed the sum awarded" (R. 44). Appellant admits that the verdict of the jury on the issue of liability could have gone either way, and regardless of which party it favored, it would have been supported by credible and substantial evidence (R. 36).

In its order, the Court expressly denied defendant-Appellee's motion for a new trial. The Court then vacated and set aside the verdict of the jury in its entirety and granted a new trial limited to the issues which were submitted to the jury, to-wit: liability and damages (R. 60-61).

It should be noticed that this memorandum and order was issued and entered on the twenty-seventh day after entry of the judgment.

SPECIFICATION OF ERRORS.

1. The Court acted in excess of its jurisdiction when, some twenty-seven days after the date on which the judgment was entered, on its own initiative, it vacated and set aside that portion of the verdict of the jury finding defendant liable for damage to plaintiff's peach orchard, and further acted in excess of its jurisdiction when it ordered a new trial on the issue of liability or causation.

2. The Court abused its discretion by forcing upon the moving party a new trial of a scope beyond that which said party had requested.

ARGUMENT.

A. THE COURT ACTED ON ITS OWN INITIATIVE IN EXCESS OF ITS JURISDICTION.

The jury returned a verdict in favor of appellant but fixed inadequate damages. Judgment on the verdict is entered on April 25, 1958. Seven days later, appellant notices a motion to vacate that portion of the judgment fixing damages and for a new trial limited to the issue of damages. Twenty-seven days later, the court issues its order in which it expressly denies appellee's motion for a new trial on all issues, in which it neither grants nor denies appellant's motion for a new trial on the limited issue of damages, but in which, in addition to that which appellant had requested it to do, it vacated the verdict of the jury on the issue of liability as well as its verdict fixing damages and ordered a new trial on the issue of liability, as well as the issue of the nature and extent of damages.

Rule 59 (d) of *Federal Rules of Civil Procedure,* Title 28, U.S.C.A., fixes the jurisdiction of the trial court to act on its own initiative in granting a new trial. It reads as follows:

> "Not later than 10 days after entry of judgment, the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

In *Kanaster v. Chrysler Corporation,* 199 Fed. 2d 610, 615 (10th Cir. 1952), the Court states:

> "Here the trial court purported to grant the motion for a new trial more than six months after

entry of the judgment, on a ground not asserted in the motion. In so doing, he acted on his own initiative and beyond his jurisdiction.

A clear distinction has always been drawn between orders granting a new trial which were within, and those without the jurisdiction of the court to grant. See Fried v. McGrath, 76 U. S. App. D.C., 388, 133 F. 2d 350. A long time ago, it was said that 'the vacating of a judgment and granting of a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If on the other hand, the order made was without jurisdiction on the court making it, then it is a proceeding which must be the subject of review by an Appellate Court.' Phillips v. Negley, 117 U.S. 665, 671, 6 S. Ct. 901, 903, 29 L. Ed. 1013".

The only grounds asserted in appellant's motion to vacate a portion of the verdict and for a limited new trial were:

"1. Inadequate damages appearing to have been given under the influence of passion or prejudice. 2. Insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages." (R. 19).

In *Nat. Farmers Union Auto & Cas. Co. v. Wood,* 207 Fed. 2d 659, 660 (10th Cir. 1953), the Court states:

"Even though a motion for a new trial is filed within ten days after entry of the judgment, the granting of a new trial on the ground not mentioned in the motion is to be treated as an action taken by the court on its own initiative. Fried v.

McGrath, 76 U.S. App. D.C. 388, 133 Fed. 2d 350; Bailey v. Slentz, 189 F. 2d 406; Kanaster v. Chrysler Corp., 10th Cir., 199 F. 2d 610, Cert. Denied 344 U.S. 921, 73 S. Ct. 388."

And on page 662:

"It (the order for a new trial) was not entered within ten days after entry of the judgment . . . It purported on its face then and there to grant a new trial itself. It stated the grounds on which the new trial was then and there being granted. And no such grounds were included in any motion for a new trial filed within ten days after entry of the judgment. Therefore, the order must be treated as action on the initiative of the Court; and being taken more than ten days after entry of the judgment it came too late and was ineffective."

Appellee filed a motion for a new trial on the tenth day after entry of the judgment. This motion was specifically denied in the order for a new trial. The grounds urged in Appellee's motion were as follows:

"(1) That the Court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant. (2) That the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the Court, and (3) Newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action." (R. 37-38).

The grounds on which the trial court based its order vacating the verdict in its entirety and granting a new trial on the two issues submitted to the jury are, appellant believes, summarized in the last paragraph of the court's memorandum, set forth just prior to its order. However, to avoid the vice of lifting a quotation out of context, it is urged that the whole of the memorandum be read (R. 57-61). The last paragraph of the memorandum reads as follows:

> "To me, the gross inadequacy of the verdict of the jury on damages is quite convincing that the jury did not give proper consideration to the evidence on the issue of liability. A motion for a new trial is addressed to the sound discretion of the Court. It is the duty of the Court to see that both parties to litigation receive a fair and impartial trial, based upon the law and the evidence. In order to accomplish this duty, I feel that a new trial must be granted on the two issues which were submitted to the jury. I feel that I have the power to do so, even though the plaintiff has restricted his motion for a new trial only on the issue of damages".

The proposition that the jury did not give proper consideration to the evidence on liability was not urged or cited or referred to in either appellant's or appellee's motion for a new trial. Such a ground is not within the scope of any motion for a new trial filed within ten days after entry of the judgment. It is a ground urged by the Court on its own initiative.

Additional cases holding that the granting of a new trial more than ten days after the entry of the judg-

ment on a ground not included, mentioned or urged in any motion for a new trial, timely filed, or the granting a new trial at a time after the jurisdiction of the court to change the judgment had passed are: *Lebeck v. William A. Jarvis, Inc.,* 250 Fed. 2d 285, 289 (3rd Cir. 1957); *Fried v. McGrath,* 133 Fed. 2d 350, 355 (D.C. Cir. 1942); *Marshall's U. S. Auto Supply, Inc. v. Cashman,* 111 Fed. 2d 140, 142 (10th Cir. 1940), certiorari denied 311 U.S. 667, 61 S. Ct. 26, 85 L. Ed. 428; *Patton v. Baltimore & Ohio R. Co.,* 120 Fed. Supp. 659, 669 (1953), 214 Fed. 2d 129 (3rd Cir. 1954); *Fine v. Paramount Pictures,* 181 Fed. 2d 300, 303 (7th Cir. 1950); *Untersinger v. United States,* 181 Fed. 2d 953, 955 (2nd Cir. 1950); *Foster-Milburn Co. v. Knight,* 181 Fed. 2d 949, 951 (2nd Cir. 1950); *In re Dernett,* 215 Fed. 673, 679 (9th Cir. 1914); *Phillips v. Negley,* 117 U.S. 665, 671-672, 6 S. Ct. 901, 903, 29 L. Ed. 1013 (1886); and *Jackson v. Wilson Trucking Corp.,* 243 Fed. 2d 212, 216 (D.C. Cir. 1957).

This latter case, *Jackson v. Wilson Trucking Corp.,* supra, presents a situation similar to that of the case at bar in respect to the conduct of the trial judge in leaning far over backwards to give both parties to the litigation every possible break, and still accomplish an end he deemed essential to justice. The losing party had moved timely for judgment N. O. V. but had not included in his motion the appropriate alternate request for a new trial. The trial court apparently determined that the evidence, though slight, was sufficient to get the issue to the jury and thereafter,

such that he could not grant a judgment N. O. V. The trial judge gave it as his opinion that the greater weight of the evidence was against the verdict and stated, "Inasmuch as the motion that was filed was timely, I feel that I have a discretion to grant the lesser remedy (a new trial) instead of the greater one" (judgment N. O. V.) (p. 214). (Note the similarity in the language used by the trial judge in the Jackson case to that used by the trial judge in the case at bar.)

The appellate court held that the trial judge had gone beyond the scope of the motion before him and hence exceeded his jurisdiction and, at page 216, stated:

> "When the trial judge in the present case found himself unable to grant the motion for judgment, there was no request for a new trial before him and the time within which he could order a new trial on his own initiative had long since expired. Accordingly, he was without authority to order a new trial."

In its opening statement concerning the action, the Appellate Court, at page 214, notes that this was an appeal from an order of the trial court awarding a new trial. Citing *Phillips v. Negley,* supra, the court approves the following rule:

> "An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the Court, it may be reviewed notwithstanding the absence of a final judgment."

B. THE TRIAL COURT ABUSED ITS DISCRETION.

Appellant was the prevailing party in the trial court. The jury found appellee liable for the injury to appellant's peach orchard, assessed his losses at $4,750.00 and awarded those damages to him (R. 16-17). All parties agree that the issue of liability could have gone either way.

> "The witnesses, Hench, Wilson, Hesse, Harper, Weigle and Brown all testified that the injury to the Grimm orchard was caused by the spray mixture, by an outside source, or by the oil in the spray. The witnesses, Thompson, Howard and Sessions, testified that the spray materials or the oil in the amounts used could not have caused this damage." (R. 36—From appellant's points and authorities in support of his motion for new trial limited to the issue of damages.)
>
> "In my view of the evidence, the causation of the damages was a difficult and close issue for the jury to decide." (R. 60—From the court's memorandum and order on motions for a new trial.)

Nowhere in its motion for a new trial on all issues (R. 37-38), in its supporting affidavit (R. 38-42), or in its memorandum in opposition to plaintiff's motion for a new triial on the issue of damages alone (R. 43-47) does Appellee contend that the verdict of the jury on the issue of causation was not fully supported by credible and substantial evidence.

The affidavit of James S. Peden, who was the foreman of the jury that heard and determined this cause, discloses that the jury deliberated for approximately

seven hours on the issue of liability and that at or about 11:00 P.M. reached a unanimous decision to the effect that the defendant was liable for the injury to the orchard; that it never was deadlocked on that issue; that the only issue on which the jury appeared to be deadlocked was the amount of loss the plaintiff had suffered, and that the amount of damages awarded was the result of a compromise (R. 48-49).

Both parties together with the Court agree that the amount of damages awarded by the jury were grossly inadequate (R. 32, 44, 59).

Based on the above, Appellant contends that he was the only party who had an adequate legal ground on which to complain about the verdict and judgment. That ground was inadequacy of the sum awarded as damages. Appellant did complain, and, within the time allowed by the Federal Rules of Civil Procedure, filed his motion for a new trial on the grounds of an inadequate award of damages and insufficiency of the evidence to justify the sum of damages arrived at by the jury.

Appellant had won at least a partial victory. He was in a position where he could have retired from the field to lick his wounds and cogitate upon the vagaries of a trial by jury or he could move forward in an effort to obtain full justice. He did move forward and suddenly, on May 22, 1958, found the rug pulled out from under him. He is deprived of even his partial victory. The choice is no longer his. It has been taken from him by the vacating of the judg-

ment in its entirety. Surely, as the aggrieved party, the appellant should have had the opportunity to choose between the half-loaf handed him by the jury and no loaf at all left to him by the trial judge.

In *Atlantic Coast Line Rr. Co. v. Bennett,* 251 Fed. 2d, 934, 939 (4th Cir. 1958), involved a situation where the jury had been erroneously instructed on the issue of punitive damages, but liability was admitted and no error was found in the compensatory damages awarded. It was found that the evidence on primary negligence and wilful misconduct were so inseparably mixed that it was not clear that no injustice would result from a trial limited to the issue of wilful misconduct and punitive damages. In these circumstances, the Appellate Court states:

> "However, since liability is admitted and no error appears in the amount of compensatory damages allowed after a full trial in the District Court, we think it proper to give the plaintiff an opportunity to elect between a new trial of the action as a whole and a retention of the unobjectionable portion of the judgment." (The Appellate Court ordered entry of its judgment reversing the trial court and ordering a new trial withheld for fifteen days to allow the plaintiff to make its election and if so advised file its remittitur of the punitive damages.)

It is the conduct of the trial court in completely depriving appellant of any choice in the matter that appellant contends was an abuse of the Court's discretion. The trial court seized upon appellant's mo-

tion and ran away with it, forcing upon the only aggrieved party something wholly beyond the scope of that which he sought.

In *Whitman v. Pitrie,* 220 Fed. 2d, 914, 918, 919 (5th Cir. 1955), in discussing an appeal from an order denying a motion for a new trial on the ground that the award of damages was excessive, the Court states:

> "While the seventh amendment forbids the power to this court to re-examine the facts found by a jury otherwise than according to the rules of common law, it does not prevent this court from reviewing the questions of law presented by the decision of the trial court on the motion for a new trial. When the court abuses its discretion, that amounts to a legal error and may be reviewed as such. Virginia Ry. Co. v. Armentrant, 4 Cir. 166 F. 2d., 400, 407, 408, 4 A. L. R. 2d 1064; 6 Moores Federal Practice, 2nd Ed., Para. 59.08 (6), P. 3827, Notes 29 and 30."

And at p. 919:

> "In reviewing a motion for a new trial based on the ground of the inadequacy or excessiveness of the verdict, as well as one based on the ground that the verdict is against the weight of the evidence, the rule applies that . . . an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error. Commercial Credit Corp. v. Pepper, 187 F. 2d 71, 75-76 (5th Cir. 1951); Huston Coca Cola Bottling Co. v. Kelley, 131 F. 2d 627, 628 (5th Cir. 1942); Fort Worth & Denver Ry. Co. v. Roach, 219 F. 2d 351, 352 (5th Cir. 1955)".

In addition to *Whitman v. Pitrie,* supra, the following cases support appellant's contention that an interlocutory order of the district court is reviewable by the Court of Appeals, if the making of the order was an abuse of discretion. The basis for the review is that whether or not the trial court abused its discretion is an issue of law not of fact: *Davis v. Yellow Cab Co.,* 220 Fed. 2d 790, 791 (5th Cir. 1955); *Turner v. United States,* 229 Fed. 2d 944, 945 (6th Cir. 1956); *Uhl v. Echols Transfer Co.,* 238 Fed. 2d 760, 761 (5th Cir. 1956).

CONCLUSION.

In connection with the District Court's order vacating and setting aside the verdict and judgment in its entirety, appellant contends that the trial court acted in excess of its jurisdiction under rule 59 (d) when it vacated and set aside that portion of the verdict and judgment declaring appellee to be liable for the injury to appellant's peach orchard and his losses suffered by reason of that injury. The District Court's order vacating and setting aside of that portion of the verdict and judgment fixing and awarding damages, on the ground of inadequacy, is supported by appellant's motion and the grounds set forth therein and was an act wholly within the Court's jurisdiction.

In connection with the District Court's order granting a new trial on both the issue of causation and the

issue of damages, appellant contends that the trial court acted in excess of its jurisdiction when it granted a new trial on the issue of causation. That portion of the order granting a new trial on the issue of the nature and extent of appellant's damages on the ground that the sum assessed and awarded was grossly inadequate was supported by appellant's motion and the grounds urged therein and was an act wholly within the court's jurisdiction.

Appellant had requested and moved for a new trial on the limited issue of the nature and extent of his damages. If the trial court abused its discretion in forcing upon appellant a new trial on the dual issues of causation and damages, which appellant contends that it did, the only abuse of discretion was in ordering that the issue of causation be included in the scope of the new trial. There was not, and could not be, any abuse of discretion in granting to appellant that which he had requested, because, to that extent, appellant had already exercised his right to elect.

Because only portions of the trial court's orders were in excess of its jurisdiction and in abuse of its discretion, should appellant prevail here, it would appear that this Court of Appeals should:

1. Reverse and set aside that portion of the District Court's order on motions for a new trial wherein it vacated and set aside the verdict and judgment in its entirety;

2. Order that portion of the verdict and judgment finding appellee liable for the injury to appellant's

peach orchard and his losses suffered by reason of that injury to be reinstated.

3. Reverse and set aside that portion of the District Court's order on motions for a new trial granting a new trial on all issues which were submitted to the jury;

4. Order a new trial on the limited issue of the nature and extent of appellant's damages.

Assuming, arguendo, that the District Court has never determined whether or not the issues of proximate cause and extent of damages are so interwoven and inseparable that a trial on the issue of damages alone cannot be had without some prejudice or injustice resulting, and for that reason the trial court has discretion to deny a motion for a new trial limited to the issue of damages, even though it be acknowledged that the damages awarded are grossly inadequate, this appellate court, noting that the trial court never expressly granted or denied appellant's motion, could order the verdict and judgment reinstated and order the trial court to further consider appellant's motion and determine whether the interests of justice would best be served by granting or denying his motion.

A third alternative, that of allowing appellant, as the only aggrieved party, a reasonable time to elect between accepting the verdict and judgment as originally entered and submitting to the new trial on the dual issues of causation and damages, might be considered. However, the vice of this third alternative

is that, by inference, it would constitute a finding that the District Court had authority or jurisdiction to make the order that it did make, notwithstanding the complete absence of any reference to the grounds on which the order was based in the motions filed within the time allowed by law.

Dated, Bakersfield, California,
November 12, 1958.

Respectfully submitted,

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